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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION  
11

12 STEVE SHAPIRO and STEVE SHAPIRO  
13 MUSIC,

14 Plaintiffs,

15 v.

16 JUPITERIMAGES CORPORATION,

17 Defendant.

CASE NO. 3:07-CV-5540 PJH

JUPITERIMAGES CORPORATION'S NOTICE  
OF MOTION AND MOTION FOR  
ATTORNEY FEES; MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT  
THEREOF

Date: March 12, 2008

Time: 9:00 a.m.

Place: Courtroom 3

JMBM  
Jeffer Mangels  
Butler & Marmaro LLP

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2  
3 PLEASE TAKE NOTICE THAT on March 12, 2008 at 9:00 a.m., or as soon  
4 thereafter as the matter may be heard, in Courtroom 3 of the above-captioned Court, located at 450  
5 Golden Gate Avenue, San Francisco, CA 94102, before the Hon. Phyllis J. Hamilton, United States  
6 District Court Judge, defendant Jupiterimages Corporation will and hereby does move this Court for  
7 an order awarding attorney fees.

8 The contract between Plaintiffs Steve Shapiro and Steve Shapiro Music and  
9 Defendant Jupiterimages Corporation ("Jupiterimages") provided that the prevailing party is entitled  
10 to its attorney fees. Plaintiffs sued Jupiterimages. Jupiterimages prevailed in the lawsuit.  
11 Accordingly, Jupiterimages is entitled to its attorney fees. An award is also proper under the  
12 Court's inherent authority.

13 This Motion is made, and based, upon this Notice of Motion and Motion, the  
14 Memorandum of Points and Authorities, the Riffer and Eisenberg Declarations, all matters and facts  
15 upon which the Court can take judicial notice, and upon such additional oral or written evidence as  
16 may be properly presented to this Court at or prior to the hearing of the Motion.

17 DATED: February 1, 2008

JEFFER, MANGELS, BUTLER & MARMARO LLP  
JEFFREY K. RIFFER

19 By: /S/ JEFFREY K. RIFFER

JEFFREY K. RIFFER

Attorneys for Defendant JUPITERIMAGES CORP.

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

STEVE SHAPIRO and STEVE SHAPIRO  
MUSIC,

Plaintiffs,

v.

JUPITERIMAGES CORPORATION,

Defendant.

CASE NO. 3:07-CV-5540 PJH

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MEMORANDUM OF POINTS AND  
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## I.

INTRODUCTION

The Asset Purchase Agreement ("Agreement") between Jupiterimages Corporation ("Jupiterimages") on one hand and Steve Shapiro and Steve Shapiro Music<sup>1</sup> (collectively "Shapiro") on the other hand provides, in relevant part, that "[i]f either party employs attorneys to enforce any rights arising out of or relating to this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees." See Eisenberg Decl. ¶ 3, Exh. A (¶ 8.1); Exhibit to First Amended Complaint, filed on or about November 20, 2008.

Shapiro filed a declaratory relief lawsuit against Jupiterimages in California. Specifically, Shapiro's First Amended Complaint ("FAC") asks for a declaration that: (a) Shapiro does not have to indemnify Jupiterimages under the Agreement for "indirect expenses for in-house attorney fees"; (b) the limitation of liability in Paragraph 6.1 of the Agreement is valid and applicable here; (c) the "indemnification process" became part of the Agreement; and (d) the Agreement should not be rescinded. See FAC ¶ 10.

This Court granted Jupiterimages' motion to dismiss because declaratory relief was improper in this Court. See Riffer Decl. ¶ 5, Exh. A. This Court then entered Judgment for Jupiterimages. Id. ¶ 6, Exh. B.

As such, Plaintiff employed attorneys "to enforce ... rights ... arising out of or relating to this Agreement"; Plaintiff's California Complaint was dismissed; Judgment was entered in favor of Jupiterimages ending the California lawsuit; and so Jupiterimages is the "prevailing party" in Shapiro's attempt to "enforce any rights arising out of or relating to this Agreement" in California.

In addition, attorney fees are appropriate under the Court's inherent authority.

Accordingly, Jupiterimages is entitled to recover its attorney fees.

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<sup>1</sup> Steve Shapiro does business as Steve Shapiro Music; Steve Shapiro Music is not an entity.

## II.

JUPITERIMAGES IS THE PREVAILING PARTY

This Court granted Jupiterimages' motion to dismiss Shapiro's declaratory relief Complaint and entered Judgment in favor of Jupiterimages. Jupiterimages is the prevailing party and is entitled to its attorney fees. See generally Heaton v. Weitz Co., Inc., 2007 WL 2301251 (N.D. Iowa 2007).

Nonetheless, during the meet-and-confer before this motion was filed, Shapiro's counsel stated that Jupiterimages was not the "prevailing party" because Jupiterimages did not prevail on the "merits." This argument is incorrect.

1. The "prevailing party" is the "party who is successful or partially successful in an action, so as to be entitled to costs." Ballentine's Law Dictionary 985 (3d ed. 1969).

There is no requirement that the prevailing party succeed on the "merits" to award costs. See Anderson v. Christian Hosp. Northeast-Northwest, 100 F.R.D. 497, 498 (E.D. Mo. 1984) ("even though this Court's dismissal of plaintiffs' claim was without prejudice and was not a dismissal on the merits, defendants are "prevailing parties" for purposes of taxing costs).

2. The D.C. Circuit -- in an opinion written by a panel with two future Supreme Court Justices -- held that where the defendant prevailed on its motion for improper venue, it was a prevailing party and awarded attorney fees. See Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant, 771 F.2d 521, 524 (D.C. Cir. 1985) (Ginsburg, J.).<sup>2</sup>

Plaintiff argued that because defendant "achieved dismissal of the action on a procedural ground not preclusive of a second action elsewhere, [it] fails to qualify as a 'prevailing party.'" Id.

Then-Judge Ginsburg rejected this argument: "[D]efendant ... has here achieved an enduring victory. [Plaintiff's] suit stands dismissed, and [Plaintiff] is forever barred from reinstituting the action in the District of Columbia." Id., 771 F.2d at 525.

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<sup>2</sup> The panel included two subsequent Supreme Court Justices: Justice Ginsburg and Justice Scalia.



1 Similarly, Jupiterimages prevailed on its motion to dismiss Shapiro's California  
2 declaratory relief lawsuit. Jupiterimages "prevailed."

3 3. Courts routinely hold that a defendant is a "prevailing party" and entitled to  
4 attorney fees where a plaintiff voluntarily dismisses its lawsuit without prejudice (and, so can file  
5 again later) and, by definition, the defendant had not prevailed on the merits.

6 "Where ... a defendant has been put to the expense of making an appearance and of  
7 obtaining an order for the clarification of the complaint, and the plaintiff then voluntarily dismisses  
8 without amending his pleading, the party sued is the prevailing party within the spirit and intent of  
9 the statute even though he may, at the whim of the plaintiff, again be sued on the same cause of  
10 action." Corcoran v. Columbia Broadcasting System, Inc., 121 F.2d 575, 576 (9th Cir. 1941).

11 In International Marble & Granite of Colorado, Inc. v. Congress Financial Corp., 465  
12 F.Supp.2d 993, 1000 & n.2 (C.D. Cal. 2006), the court granted defendant's motion to dismiss, but  
13 gave plaintiff leave to amend. Instead of amending, the plaintiff dismissed the case without  
14 prejudice. The court held that the defendant was a "prevailing party" and awarded attorney fees:  
15 "Plaintiff's complaint caused Defendant to expend considerable resources on its motion to dismiss  
16 and on discovery. Regardless of why Plaintiff did not file an amended complaint, under these  
17 circumstances, Defendant should be considered the prevailing party." Id.

18 The court further noted: "calling Defendant a 'prevailing party' does not indicate that  
19 Defendant prevailed on the merits; rather, it indicates that Defendant prevailed by achieving  
20 dismissal of a complaint that did not come close to passing muster." Id.

21 In Maljack Prods, Inc. v. Palisades Entertainment, 1995 WL 779154 (C.D. Cal.  
22 1995), the defendant filed a motion to dismiss for lack of personal jurisdiction and plaintiff  
23 subsequently dismissed defendant without prejudice. The Court held that the defendant was the  
24 "prevailing party" and entitled to attorney fees. Id. at \*1. In "spite of its age, Corcoran<sup>3</sup> is still  
25 good law and continues to be cited favorably by courts in many circuits." Id. \*2.

26 Other courts have also so held. See, e.g., Telegen Communications Corp. v.

27 <sup>3</sup> Corcoran is cited three paragraphs above in the text.

1 Weinberger, 1998 WL 849076 (N.D. Cal. 1998) (defendants were "prevailing parties" where  
 2 plaintiff dismissed its case without prejudice after defendants filed a motion to dismiss for lack of  
 3 personal jurisdiction and, as to some defendants, another motion as well, although the court did not  
 4 award attorney fees for other reasons); Dean Vincent, Inc. v. Krishell Labs, Inc., 271 Or. 356, 358,  
 5 532 P.2d 237 (1975) ("The trial court denied attorney's fees because it did not believe defendant  
 6 qualified as the 'prevailing party.' However, defendant was the prevailing party because a voluntary  
 7 nonsuit terminates the case in a defendant's favor. Even though the termination was without  
 8 prejudice and plaintiff could file another case upon the same cause of action, these facts did not  
 9 prevent defendant from being the party in whose favor the judgment was rendered in that particular  
 10 case."); see also In re Arrow Transp. Co., 224 B.R. 457, 461 (Bank. D. Or. 1998) ("Where ... the  
 11 opposing party is put to the expense of filing pleadings which controvert the WARN Act claim, it is  
 12 a prevailing party ... regardless of whether the claimant later withdraws its claim or the objecting  
 13 party prevails on the merits."); see generally First Commodity Traders, Inc. v. Heinold  
 14 Commodities, Inc., 766 F.2d 1007, 1015 (7th Cir. 1985) ("Under Rule 54(d), 'where there is a  
 15 dismissal of an action, even where such dismissal is voluntary and without prejudice, the defendant  
 16 is the prevailing party.'").

17 4. Courts "have awarded attorney fees to a party obtaining an appealable order or  
 18 judgment in a discrete legal proceeding even though the underlying litigation on the merits was not  
 19 final." Otay River Constructors v. San Diego Expressway, - Cal.App.4th -, 2008 WL 60264 \*7  
 20 (2008); Christensen v. Dewor Developments, 33 Cal. 3d 778, 786–87 (1983) (party prevailing on  
 21 petition to compel arbitration was entitled to attorney fees, despite the lack of a final resolution on  
 22 the underlying merits of the dispute between the parties); Marcus & Millichap Real Estate  
 23 Investment Brokerage Co. v. Woodman Investment Group, 129 Cal.App.4th 508, 510–13 (2005)  
 24 (successful party on motion to vacate arbitration award was entitled to contractual attorney fees and  
 25 costs even though the parties had not resolved the underlying merits of the arbitration); Cole v. BT  
 26 & G, Inc., 141 Cal. App. 3d 995, 996–98 (1983) (defendants successful in vacating a confession of  
 27 judgment were prevailing parties entitled to contractual attorney fees even though underlying  
 28 litigation on the contract was not final).

1 Similarly, Jupiterimages prevailed on its motion to dismiss Shapiro's California  
2 declaratory relief lawsuit. Jupiterimages "prevailed."

3 5. A party also "prevails" and is entitled to attorney fees where its adversary loses  
4 because of discovery abuse (and, again, there is no ruling on the merits). See, e.g., Truegreen  
5 Landcare, LLC v. Elm City Dev. & Const. Serv., LLC, 101 Conn. App. 11, 919 A.2d 1077, 1079  
6 (2007) (tenant was "prevailing party" under the contract even though it obtained judgment due to  
7 adversary's discovery abuse rather than on the merits).

### 8 III.

#### 9 ATTORNEY FEES ARE ALSO PROPER UNDER THE COURT'S INHERENT POWER

10 The Court retains the inherent power to shift fees in its discretion where a party acted  
11 in bad faith, vexatiously, wantonly, or for oppressive purposes. Chambers v. NASCO, 501 U.S. 32,  
12 45-46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991); accord Fink v. Gomez, 239 F.3d 989, 993-94 (9th  
13 Cir. 2001) (court's inherent power to sanction available upon finding that party acted in bad faith or  
14 engaged in "conduct tantamount to bad faith," including recklessness when combined with an  
15 additional factor such as frivolousness, harassment, or an improper purpose).

16 Shapiro filed his check-the-boxes California Complaint in anticipation of  
17 Jupiterimages suing him in Connecticut. He sued here to try improperly to obtain a California  
18 forum for a dispute that should be adjudicated in Connecticut. His counsel refused to dismiss this  
19 Complaint, even though Jupiterimages' counsel requested that he do so. See Riffer Decl. ¶ 7, Exh.  
20 C, D and E.  
21

### 22 IV.

#### 23 A PREVAILING PARTY IS ENTITLED TO ATTORNEY FEES FOR THE TIME MAKING THE 24 MOTION FOR ATTORNEY FEES

25 A prevailing party may recover "fees on fees" on the grounds that the prevailing  
26 party should be compensated for time spent proving the value of the attorney's services. See  
27 Hernandez v. Kalinowski, 146 F.3d 196, 199 (3rd Cir. 1998); Board of Trustees of Hotel &  
28

1 Restaurant Employees Local 25 v. JPR, Inc., 136 F.3d 794, 808 (D.C. Cir. 1998); Kumble v.  
 2 Windsor Plaza Comp., 555 N.Y.S.2d 290 (N.Y. App. Div. 1990); Ross v. Congregation B'Nai  
 3 Abraham Mordechai, 814 N.Y.S.2d 837, 848 (N.Y. Civ. Ct. 2006).

4  
 5 V.

6 JUPITERIMAGES IS ENTITLED TO ITS ATTORNEY FEES

7 Jupiterimages incurred attorney fees of over \$48,000 in defending this case and  
 8 estimates that it will incur another \$20,000 through the hearing on this motion. See Riffer Decl. ¶¶  
 9 19, 27. Those figures are based on the following:

10 Jupiterimages incurred attorney fees in excess of \$1,200 in reviewing and analyzing  
 11 the initial Complaint and background documents and related matters. See Riffer Decl. ¶ 20.

12 Jupiterimages incurred attorney fees in excess of \$1,600 in drafting the removal  
 13 papers and related motion to seal and related matters. See Riffer Decl. ¶ 21.

14 Jupiterimages incurred attorney fees in excess of \$12,500 in drafting the motion to  
 15 dismiss the original Complaint and related matters. See Riffer Decl. ¶ 22.

16 Jupiterimages incurred attorney fees in excess of \$2,000 in drafting the motion to  
 17 dismiss the First Amended Complaint and related matters. See Riffer Decl. ¶ 23.

18 Jupiterimages incurred attorney fees in excess of \$13,000 in reviewing Plaintiff's  
 19 opposition papers and drafting the replay papers in support of its motion to dismiss the First  
 20 Amended Complaint. See Riffer Decl. ¶ 24.

21 Jupiterimages incurred attorney fees in excess of \$7,000 in preparing for, and  
 22 attending, the hearing on the motion to dismiss the First Amended Complaint and related matters.  
 23 See Riffer Decl. ¶ 25.

24 Jupiterimages incurred attorney fees in excess of \$11,500 in researching its right to  
 25 obtain attorney fees and drafting this motion for attorney fees. See Riffer Decl. ¶ 26.

26 Jupiterimages estimates that it will incur in excess of another \$13,500 in attorney  
 27 fees in reviewing Plaintiff's opposition papers and drafting the reply papers for this motion for  
 28 attorney fees; and another \$7,500 in attorney fees preparing for, and attending, the hearing on this

1 motion. See Riffer Decl. ¶ 27.

2 VI.

3 CONCLUSION

4 Accordingly, this Court should grant Jupiterimages' motion and enter an award  
5 granting Jupiterimages its attorney fees.

6  
7 DATED: February 1, 2008

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JEFFREY K. RIFFER

8  
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